

(2005) 01 KL CK 0048
In the High Court Of Kerala
Case No : S.A. No. 405 of 1992 (F)

Rajan and Others

APPELLANT

Vs

Balan and Others

RESPONDENT

Date of Decision : 13-01-2005

Acts Referred:

Easements Act, 1882 — Section 13, 14, 19, 35, 38
Transfer of Property Act, 1882 — Section 8

Citation : AIR 2005 Ker 111 : (2005) 1 ILR (Ker) 465

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : P.V. Chandra Mohan, for the Appellant; Rajnith Tahmpan and P.A. Anitha for Respondent Nos. 3 to 6, for the Respondent

Final Decision : Allowed

Judgement

V. Ramkumar, J.—The defendants in OS 469/1983 on the file of the Munsiff s Court, Irinjalakuda, are the appellants in this second appeal. The said suit was one for a perpetual injunction restraining the defendants from trespassing upon or planting trees or otherwise interfering with the user by the plaintiff of the plaint schedule pathway alleged to be passing along the northern extremity of the 84 cents of land comprised in Sy. No. 964/2, which will be adverted to in detail hereafter.

2. The basis of the plaint claim was a right of way over the plaint schedule pathway given, under Ext. B1 partition dated 9-4-1119 M.E. corresponding to the year 1944 and the plaintiff contended that he has unrestricted right to use the pathway as an easement.

3. The defendants/appellants resisted the plaint claim contending inter alia that the plaintiff did not have any subsisting right of easement over the plaint schedule pathway and that whatever rights the plaintiff had, ceased to exist after the execution of Ext. B2 sale deed dated 9-6-1959.

4. On the side of the plaintiff two documents were marked as Exts. A1 and A2 and the plaintiff was examined as P.W. 1 who is a toddy tapper by profession. Another toddy tapper was examined as P.W. 2. On the side of the defendants/appellants, the 1st defendant was examined as D. W. 1 and an immediate neighbour was examined as D.W. 2; Two documents were marked as Exts. B1 and B2.

5. The learned Munsiff, after trial, as per judgment and decree dt. 20-11-1995 dismissed the suit with costs, On appeal by the plaintiff, the lower Appellate Court as per judgment and decree dated 6-11-1990 reversed the decree passed by the trial Court and decreed the suit as prayed for, put without costs. It is the said Appellate decree which is assailed in this second appeal by the defendants.

6. While admitting this second appeal, notice on the following substantial questions of law was ordered by this Court :--

"(a) Cannot an easement by express grant be released by implication ?

(b) Is not Section 38 of the Indian Easement Act applicable to an easement by express grant ?

(c) Is not the burden of proving an easement by necessity upon the person who claims it ?

(d) Is not Ext, B2 a document releasing the right of easement by the vendor ?

(e) Cannot an easement by express grant be lost by abandonment."

7. When this second appeal came up for hearing on 3-1-2005, the learned counsel for the respondent did not appear and argue the case in spite of notice and therefore the learned counsel for the appellants was heard and a judgment allowing the appeal was dictated in open Court. Thereafter the learned counsel for the respondent requested for an opportunity to hear him and accordingly the unsigned judgment was recalled and both sides were again heard. I heard Advocate Sri P. V. Chandramohan appearing for the appellants and Advocate Sri Rajnith Tahmpan appearing for the respondent.

8. Adv, Sri Rajnith Tahmpan, the learned counsel appearing for the respondent, made the following submissions before me in support of the judgment under appeal :--

Even though the 1st defendant examined as D.W. 1 would say that the plaintiff has access to the panchayath road through the paddy field, the plaintiff examined as P.W. 1 has definitely stated that the plaint schedule pathway is the only access for him to reach the panchayath road. Under Ext. B1 partition deed, a light of way has been given by way of express grant. As per Ext. B2 and the other sale deed executed on the same day, there was only a mutual exchange of the properties between Velunni and Ravunni. Therefore, when Velunni got title over 38 1/2 cents of land covered by Ext. B2, it can only be subject to the easement which was attached to the land. There was no need to further reserve

the right of easement in Ext. B2 in view of Section 19 of the Indian Easements Act, 1882. The defendant has not proved any abandonment, extinguishment, release or implied surrender of the easement which runs with the land consequent on the transfer under Ext. B2 by virtue of Section 8 of the Transfer of Property Act. Even if what D.W. 1 has deposed is true, he wants the plaintiff to pass through somebody else's property. The availability of a way, if any, through somebody else's property does not extinguish the easement by express grant. P.W. 1 has asserted that the pathway provided in Ext. B1 is the only way and he has not given up the same. P.W. 2 has also supported the plaintiff. The easement will be extinguished only when the plaintiff, who is the dominant owner, has released it expressly or impliedly to the defendants who are the servient owners as provided u/s 38 of the Easements Act. Explanation II to the said provision shows that even a mere non-user of an easement does not amount to an implied release within the meaning of Section 38 of the Easements Act. Hence, the plaintiff was entitled to an injunction to restrain the disturbance of the easement within the meaning of Section 35 of the Easements Act: The Commentary at page 520 of the 10th edition of Kattiar on Easements shows that the easement passes with the transfer of dominant heritage. Page 784 of the said commentary mentions the three ingredients necessary to find a release of the easement by implication. All those ingredients are absent in this case. The lower Appellate Court has correctly held that the easement in this case is by way of an express grant and there is no abandonment of the said easement by the plaintiff. The Court below has also held that in Ext. B2 sale deed, the said right of easement has not been given up. The appellate judgment does not call for any interference.

9. I am afraid that I cannot agree with the above submissions. An extent of 76 cents of land comprised in Sy. No. 963 of Kodakara village and another extent of 84 cents of land comprised in Sy. No. 964/2 of the said village belonged to one Manikan. The said Manikan had two sons by name Ravunni and Velunni. Both Ravunni and Velunni are dead. The plaintiff is the son of Ravunni and defendants 1 to 3 are the children of Velunni and the 4th defendant is the widow of Velunni. After the death of Manikan, the above properties were partitioned between his two sons Ravunni and Velunni as per Ext. B1 partition deed dated 9-4-1944 of which Ext. A1 is a copy. The 76 cents of land comprised in Sy. No. 963 was divided equally among Ravunni and Velunni with the eastern half admeasuring 38 cents set apart to Ravunni as item No. 1 of the A schedule and the western half of equal extent set apart to Velunni as item No. 1 of the B schedule to Ext. B1. The other item viz. 84 cents of land comprised in Sy. No. 964/2 was also divided between the two brothers. 68 1/2 cents towards the eastern portion was set part to Ravunni, the elder brother, as item 2 of the A schedule and 15 1/2 cents on the western portion was set apart to Velunni as item No. 2 of the B schedule to Ext. B1 partition deed. Ravunni, the elder brother, was admittedly, residing to the west of B schedule item No. 2 (15 1/2 cents) allotted to Velunni and Velunni was residing to the east of the 68 1/2 cents allotted to Ravunni as item No. 2 of the A schedule of Ext. B1. It was presumably for this reason that Ext. B1 partition

provided for a pathway along the northern extremity of the entire 84 cents referred to above and comprising of item 2 of the B schedule and item 2 of the A schedule to Ext. B1 partition. The relevant recital in Ext. B1 reads as follows :

(Vernacular- matter omitted.... .Ed.)

Ravunni is executant No. 1 and Velunni is executant No. 2. The effect of the recital in Ext. B1 partition deed as extracted hereinabove is that Velunni and his successors (i.e. the defendants) have been given a right of way along the pathway at the northern extremity of plot A2 (given to Ravunni) from plot B2 (given to Velunni) obviously to reach Velunni's house on the east and back and Ravunni and his successors (i.e. the plaintiff) have been given a similar right over Velunni's plot (plot B2) to reach Ravunni's plot (plot A2) from Ravunni's house on the west and back. Thus, Velunni was the dominant owner of B schedule item 2 (15 1/2 cents) which was the dominant heritage in respect of the pathway provided through A schedule item 2 (68 1/2 cents) which was the servient heritage of which Ravunni was the servient owner. Likewise, Ravunni was the dominant owner of A schedule item 2 (68 1/2 cents) which was the dominant heritage in respect of the pathway provided through B schedule item 2 (15 1/2 cents) which was the servient heritage of which Velunni was the servient owner. This was actually an easement of necessity falling u/s 13 of the Easements Act and by malting the provision for the way in Ext. B1 partition, the father of Ravunni and Velunni was only setting out the way as provided in Section 14 of the Easements Act. It cannot be termed as an express grant.

10. There is no dispute that out of the 68 1/2 cents allotted to Ravunni as item No. 2 of the A schedule to Ext. B1 partition deed, he had also sold 30 cents towards the southern portion to one Manikan and others and thereafter Ravunni had retained with him only 38 1/2 cents towards the northern portion in his possession. Probably realising the inconvenience to Ravunni residing to the east of the 15 1/2 cents allotted to Velunni to cross over Velunni's property to reach his 68 1/2 cents of land and the similar inconvenience caused to Velunni to cross over Ravunni's property to reach his 15 1/2 cents of land, the two brothers decided to mutually exchange item 1 of B schedule and the remaining item 2 of A schedule. Accordingly on 9-6-1959 two sale deeds were executed effecting the above exchange. As per Ext. B2 sale deed dated 9-8-1959 Ravunni sold 38 1/2 cents forming part of item No. 2 of A schedule to Ext. B1 partition deed to Velunni and as per another sale deed executed on the same day Velunni in turn sold 38 cents constituting item No. 1 of B schedule to Ext. B1 partition deed to Ravunni. The resultant position was that Velunni became the absolute owner in respect of the entire 15 1/2 cents as well as 38 1/2 cents (54 cents in all) lying contiguously and comprised in Sy. No. 364/ 2 and Ravunni became the absolute owner of the entire 76 cents comprised in Sy. No. 963. In other words, after the two brothers mutually exchanged the said properties, Ravunni the father of the plaintiff had no property at all comprised in Survey 964/2 and so much so there arose no need for Ravunni to any more proceed to A schedule item No. 2 of Ext.

B1 partition. To put it differently, after the aforesaid exchange, the dominant heritage, of which Ravunni was the owner, came to vest in the servient owner (Velunni) himself and the servient heritage of Velunni for the convenient enjoyment of the 15 1/2 cents, of which he was dominant owner, came to vest in Velunni himself. If the ownership of the dominant and servient tenements gets coalesced in a single person, the easement comes to an end. (Moideen Haji v. Kadir 1964 KLJ 904). One of the essential features of an easement is that it should be associated with 2 tenements -- a dominant and a servient. (See Irinjakuda Bank Ltd. Vs. Irinjalakuda St. Mary's Church and Others, When after the exchange the 2 tenements ceased to exist, there is no question of any easement either by way of express grant or by way of necessity. While the defendants produced Ext. B2 sale deed executed by the plaintiffs father Ravunni in favour of Velunni, the plaintiff cleverly refrained from producing the reciprocal deed executed on the same day by Velunni in favour of Ravunni. But it is admitted that the recitals in both documents which constitute the mutual exchange are identical. In Ext. B2 there is an unequivocal recital by Ravunni as follows :--

(Vernacular matter omitted.....Ed.)

So, Ravunni did not retain any right whatsoever over the property conveyed under Ext. B2. The entire 3814 cents including the area that was occupied by the site of the pathway at the northern extremity has been assigned by Ravunni to Velunni as per Ext. B2 without the pathway either being shown as the northern boundary or any right over the same being reserved in favour of the vendor. Same is the position with regard to the sale deed executed by Velunni to Ravunni. Since no commission had been taken out in both the Courts below, for the sake of convenience a rough sketch showing the allotment under Ext. B1 partition deed and the position after Ext. B2 exchange is given below :

(Vernacular matter omitted.....Ed.)

In the above rough sketch items 1 and 2 of the A schedule and items 1 and 2 of the B schedule to Ext. B1 partition deed are shown as plots A1, A2, B1 and B2 respectively. There is no dispute that third parties have properties in between the house of Ravunni and plot B2 and in between plot A2 and the house of Velunni.

11. The defendants in the written statement had specifically pleaded that after the mutual exchange in the year 1959 the plaintiff's predecessor was not using the so-called way through plot A2. This plea was taken in denial of the plaintiff's averment that the plaintiff's predecessor and after his death the plaintiff has been using the said way in question. Still the plaintiff did not take out a commission presumably fearing that he will not be able to prove continued user of the pathway. In fact, the plaintiff had filed I.A. 2468/83 for issuing a commission. But the same was got dismissed as not pressed. Similarly, the plaintiff had filed third party affidavits along with the plaint to substantiate his case of continued user of the pathway. But the deponents of none of those affidavits were

examined before Court. Ext. A2 assignment deed dated 26-2-1985 which came into existence long after the institution of the suit, was pressed into service by the plaintiff to contend that the plaintiff purchased from one Mundakkal Narayanan a strip of land admeasuring one fourth of a cent which was connecting the plaint schedule pathway from plot B2 and the Panchayat road on the east. According to him he has been using the said strip of land for ingress and egress from his property to the Panchayat road from very ancient times as of right. If he was using the said strip of land as of right, it does not stand to reason as to why he purchased it from the owner particularly when Ext. A2 sale deed was the culmination of a settlement between the plaintiff and the said Narayanan in a suit O.S. 136/84 filed by the said Narayanan against the plaintiff for restraining the plaintiff from using his property. A perusal of Ext. B1 will show that the property on the eastern boundary plot A2 is that of Chithalan Chathu and when it came to Ext. B2, the eastern boundary is shown as the property of Chethalan Lonappan. Going by Ext. B1, the property of Mundakkal Narayanan constitutes the western boundary of plot A2. Similarly, in between plot B2 and the plaintiffs house is the property of one Puluchiyath Venu Menon, who is alive (P.W. 1-page 3). The plaintiff examined as P.W. 1 would claim that the said Venu Menon has given him land for user as pathway. Except the assertion by P.W. 1 there was no acceptable evidence to prove the said statement. Moreover, the whole attempt of the plaintiff has been to claim a right of way from his house to the Panchayat Road to the east of plot A2 separated by the properties of third parties. Ext. B1 partition deed had dealt with and could have dealt with only the properties covered therein and not the properties of third parties. Whatever rights conferred by Ext. B1 over the pathway ceased to exist with the exchange deeds as discussed earlier. Any other right of way unconnected with Ext. B1 partition deed and in respect of properties situated outside the said partition deed cannot be claimed or established in a suit against the heirs of Velunni alone. The lower appellate Court was not justified in holding that the right of way under Ext. B1 was an easement by express grant and that the defendants have not discharged the burden of proving that the plaintiff has abandoned the said easement. When with Velunni becoming the absolute owner of both plots there did not exist any dominant or servient tenement, the claim for injunction on the basis of an easement was wholly misconceived.

The judgment and decree of the lower appellate Court are accordingly set aside and those of the trial Court are restored. This second appeal is thus allowed as above. The parties shall bear their respective costs.